STATE OF MICHIGAN

IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

v

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly & Severally,

Defendants-Appellants.
_____/

SC No. 154717
COA No. 325133
LC No. 13-3802-NH
(Macomb Circuit Court)

REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants refer this Court to the corresponding section at page v of their Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER PLAINTIFF'S CLAIM WAS PROPERLY DISMISSED UNDER MCR 2.116(C)(7) AND MCL 600.5838a(2) BECAUSE PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED HIS MALPRACTICE CLAIM BY JANUARY 3, 2011, WHEN HE WAS DIAGNOSED WITH END-STAGE RENAL DISEASE DESPITE ALLEGEDLY HAVING BEEN TOLD BY DEFENDANTS IN YEARS PRIOR THAT HIS KIDNEYS WERE FINE, AND PLAINTIFF FAILED TO FILE HIS CLAIM IN THE ENSUING SIX MONTHS?

Plaintiff-Appellant says "no."

Defendants-Appellees say "yes."

The trial court says "yes."

The Michigan Court of Appeals says "no."

II.

WHETHER THE TRIAL COURT PROPERLY DISREGARDED AS HEARSAY PLAINTIFF'S AFFIDAVIT PURPORTING TO ESTABLISH THAT PLAINTIFF DID NOT DISCOVER HIS MALPRACTICE CLAIM UNTIL SEPTEMBER 2012?

Plaintiff-Appellant says "no."

Defendants-Appellees say "yes."

The trial court says "yes."

The Michigan Court of Appeals says "no."

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants refer this Court to the corresponding section at page vii of their Application for Leave to Appeal.

STATEMENT OF FACTS

Defendants-Appellants Shyman Mishra, M.D. ("Dr. Mishra") (together with Defendant-Appellant Shyam N. Mishra, M.D., P.C., "Defendants"), rely on the Statement of Facts found at pages 1-9 of their Application for Leave to Appeal. Defendants note that Plaintiff-Appellee Kerry Jendrusina ("Plaintiff") admits in his response that: (1) Dr. Mishra tested Plaintiff's kidney function in 2008 when Plaintiff first experienced edema, and reassured Plaintiff that there was nothing to worry about with respect to his kidneys; and (2) Dr. Mishra informed Plaintiff following his kidney ultrasound in 2009 that his kidneys were "fine" (Plaintiff's response, p 5). These undisputed facts form the basis for Defendants' position that the Court of Appeals improperly found a question of fact existed as to whether Plaintiff should have discovered a possible cause of action against Dr. Mishra in January 2011, when Plaintiff was unequivocally informed that he had end-stage renal disease, was in acute kidney failure, and that his "kidney number" was way past the point where Plaintiff should have been on dialysis.

THIS APPLICATION SATISFIES THE CRITERIA FOR SUPREME COURT REVIEW

Plaintiff incorrectly asserts that this is an interlocutory appeal from a nonfinal order. The October 23, 2014 Order of the trial court granted summary disposition to Defendants and dismissed Plaintiff's claims with prejudice—the epitome of a final order, which Plaintiff then appealed of right to the Court of Appeals. If this Court grants the relief requested in Defendants' Application for Leave to Appeal, it will result in disposition of the entire case. Plaintiff's arguments regarding this Court's alleged reluctance to entertain interlocutory appeals, made without citation to authority, are therefore irrelevant to the instant case involving a final order.

Rather, nearly all appellate review by this Court—of final and nonfinal orders alike—is discretionary and governed by the criteria set forth in MCR 7.305(B). As detailed in pages 10-12 of Defendants' Application, there are several reasons why this Court should grant leave to review the published Majority Opinion of the Court of Appeals presenting a binding interpretation (and in Defendants' view, a redefinition) of the six-month "discovery rule" exception to the statute of limitations. Plaintiff makes no response to these arguments and otherwise does not explain why this Application fails to satisfy the criteria for review in MCR 7.305(B).

Defendants refer the Court to the amicus brief filed by Michigan Defense Trial Counsel ("MDTC") in support of Defendants' Application, offering a thorough and compelling analysis of the jurisprudential dangers posed by the precedential Majority Opinion, and the corresponding need for this Court's review. In summary, the Majority Opinion converts the objective "should have discovered" standard in MCL 600.5838a(2) into a subjective "actually discovered" standard, and removes the longstanding

requirement that a potential plaintiff exercise reasonable diligence in discovering a possible claim of malpractice, contrary to the Legislature's purpose in enacting tort reform measures, the express language of § 5838a(2) placing the burden of proof on the plaintiff, and this Court's decisions in *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997), and *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993) (MDTC amicus brief, p 1).

The potential far-reaching impact of the published Majority Opinion—not only in medical malpractice cases, but in all cases involving the objective "should have discovered" standard—negates Plaintiff's assertion that this Court's review is unnecessary because this case may ultimately be resolved in Defendants' favor. Thanks to the Majority's efforts in creating a new discovery rule standard using arguments not advanced by Plaintiff, this case is now about more than just the dispute between these parties. It concerns whether the statute of limitations will survive as a viable defense to protect defendants from stale and fraudulent claims; moreover, Defendants are entitled to the benefit of that defense now, before the time and expense of trial, as was intended by the Legislature. Plaintiff simply cannot credibly argue that leave to appeal should be denied because "there is nothing special about the case or its issues" (Plaintiff's response, p 16). For all of these reasons, and the reasons previously stated in Defendants' Application, this Court should vacate the Majority Opinion and adopt the Dissenting Opinion, or grant leave to appeal.

ARGUMENT I

PLAINTIFF'S CLAIM WAS PROPERLY DISMISSED UNDER MCR 2.116(C)(7) AND MCL 600.5838a(2) BECAUSE PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED HIS MALPRACTICE CLAIM BY JANUARY 3, 2011, WHEN HE WAS DIAGNOSED WITH END-STAGE RENAL DISEASE DESPITE ALLEGEDLY HAVING BEEN TOLD BY DEFENDANTS IN YEARS PRIOR THAT HIS KIDNEYS WERE "FINE," AND PLAINTIFF FAILED TO FILE HIS CLAIM IN THE ENSUING SIX MONTHS.

Plaintiff's response leaves the majority of Defendants' arguments on application unrebutted, and does not defend, endorse, or otherwise adopt the Majority Opinion's theory that Plaintiff should not have discovered his possible cause of action in January 2011 because he did not know whether his renal failure was the result of an acute incident or a progressive condition (**Exhibit A**, Majority Opinion, p 5).[1] This only confirms that the Majority went far beyond the record and the arguments of the parties on appeal to create binding precedent outside the crucible of the adversarial process. The Majority did not do so to address a controlling legal issue that the parties had failed to adequately brief,[2] but rather to manufacture a factual record and arguments to support a more lenient and subjective discovery rule. This Court should not countenance such judicial activism from an error-correcting intermediate court.

Plaintiff incorrectly asserts that this Court's decision in *Solowy* is distinguishable from the instant case because *Solowy* examined the "possible" versus "likely" cause of

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[1] All exhibits referenced herein are the same as those filed with Defendants' Application for Leave to Appeal, and are not resubmitted with this reply brief.

[2] See *Mack v City of Detroit*, 467 Mich 186, 208-209; 649 NW2d 47 (2002) (recognizing this Court's ability to resolve controlling legal issues outside the scope of the parties' briefing and the issues raised on appeal).

action standard, rather than the difference between "should have discovered" and "could have discovered" (Plaintiff's response, p 22). However, for the reasons explained in Argument I, section F of Defendants' Application, the Majority Opinion's articulation of the "should have discovered" standard is in fact an attempt to return to the "likely cause of action" standard rejected in *Solowy*, and should be rejected for that reason. Compare **Exhibit** A, p 5 ("the question is whether a reasonable *person*…should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease") (italics original) (underlining supplied), to *Solowy*, 454 Mich at 224-225 (Michigan's "possible cause of action standard does not require that the plaintiff know that the injury…was in fact or even likely caused by the defendant doctors' alleged omissions"). Moreover, the Majority Opinion actually distinguished *Solowy* on the basis that the plaintiff in *Solowy*, unlike Plaintiff in this case, allegedly "neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history" (**Exhibit A**, p 5). Again, Plaintiff does not endorse, defend or otherwise address the outcome-determinative arguments made in the Majority Opinion, raising serious questions about whether those arguments should form the basis for changing Michigan's well-settled discovery rule jurisprudence under *Solowy*.

Plaintiff lists several cases purportedly establishing that the discovery rule exception to the statute of limitations is a question for the jury to decide (Plaintiff's response, pp 19-20, 23). The problem with Plaintiff's argument is that most of these cases predate this Court's watershed decision in *Solowy* confirming that, in the presence of undisputed facts, the question of when a patient discovered or should have discovered a

malpractice claim is a question of law to be determined by the trial court. 454 Mich at 230, citing *Moll*, 444 Mich at 26. The lone post-*Solowy* statute of limitations case cited by Plaintiff, *Kincaid v Cardwell*, 300 Mich App 513; 834 NW2d 122 (2013), addresses the last-treatment rule eliminated by MCL 600.5838a, not the discovery rule relevant to this case. Moreover, the courts in both *Kincaid* and *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250; 506 NW2d 562 (1993), concluded on the basis of the undisputed facts in those cases that the statute of limitations question was a question of law for the court, not a question of fact for the jury. Two of the other pre-*Solowy* discovery rule cases cited by Plaintiff, *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500 (1991), and *Moss v Pacquing*, 183 Mich App 574; 455 NW2d 339 (1990), utilize an outdated standard[3] that was relied on by the Court of Appeals panel in *Moll*, 192 Mich App 724, 734-735; 482 NW2d 197 (1992), and subsequently rejected and reversed by this Court in *Moll*, 444 Mich at 26-29. See Argument I, section F of Defendants' Application. Notably, the Majority Opinion makes only one passing reference to any of these cases, while ultimately holding that the discovery rule applies in this case <u>*as a matter of law*</u>, not that the issue should be resolved by a jury at trial.

Plaintiff invokes the outdated discovery rule standard of *Kermizian* and *Simmons* in an attempt to resurrect the "likely cause of action" standard rejected by this Court in *Solowy* and *Moll*, and to improperly suggest that the defendant bears the burden of showing the inapplicability of the discovery rule (Plaintiff's response, p 23). As set forth in Argument I, sections C and F of Defendants' Application, the plain language of § 5838a(2)

[3] "All that is required is that the plaintiff know of the act or omission of the defendant and have reason to believe that the medical treatment was improper or was performed in an improper manner." *Kermizian*, 188 Mich App at 694. See also *Simmons*, 201 Mich App at 255.

places the burden of proof on the plaintiff to show that his otherwise tardy cause of action is saved by the discovery rule, and any suggestion to the contrary directly contradicts the Legislature's clear intent:

> The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim *is on the plaintiff*.

MCL 600.5838a(2) (emphasis supplied).

Both Plaintiff and the Majority Opinion mischaracterize Defendants' position as equating a patient's mere knowledge of an adverse medical event with discovery of a possible medical malpractice cause of action (Plaintiff's response, pp 10, 23) (**Exhibit A**, pp 5-7). This gross oversimplification ignores the undisputed facts of this case: Plaintiff knew his kidney function was being monitored, through at least one round of bloodwork testing his "kidney number" and through a kidney ultrasound; and his diagnosis of end-stage renal disease and kidney failure two years later should have alerted Plaintiff to a *possible* cause of action against Dr. Mishra, who allegedly had reassured Plaintiff that his kidneys were "fine" and he had nothing to worry about with respect to his "kidney number." Here, as in *Solowy*, after Plaintiff was unequivocally diagnosed with kidney failure in January 2011 after being reassured by Dr. Mishra that his kidneys were "fine," Plaintiff, "while lacking specific proofs, was armed with the requisite knowledge to diligently pursue her claim." *Solowy*, 454 Mich at 225. This is the same straightforward analysis applied to the undisputed facts by the trial court and by Judge Jansen in her Dissenting Opinion, in stark contrast to the factual fabrications and legal gymnastics featured in the Majority Opinion:

> The Court opines that plaintiff should have discovered his claim by January 3, 2011, when he started hemodialysis, at which time there was no question that he was diagnosed with end-stage renal disease. As of that time, plaintiff

> should have been aware that such diagnosis was contradictory to defendants' diagnosis. As addressed above, plaintiff testified that defendants had informed him there was nothing to worry about in terms of his kidneys. *Solowy*, *supra*; *McGuire*, *supra*. Thus, plaintiff had 6 months from such date within which to file his claim, or, more specifically, he should have filed his claim by July 3, 2012 at the latest. Since he failed to do so, his claim is time-barred.

(**Exhibit F**, trial court opinion, p 4).

> [P]laintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there may be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and he knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

(**Exhibit B**, Dissenting Opinion, p 3).

Finally, Plaintiff's citation to *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977), and *Miller v Miller*, 373 Mich 519; 129 NW2d 885 (1964), for the notion that the question of what a "reasonable person" would do is reserved for the jury, ignores that those cases involved the "reasonable person" standard of care in negligence actions, not the discovery rule with respect to a statute of limitations analysis. Again, this Court determined in *Solowy* and *Moll* that the objective discovery rule analysis is best performed by the trial court in the presence of undisputed facts. Moreover, this Court's jurisprudence in other areas of the law, such as the open and obvious defense in premises liability actions, has entrusted the determination of what a "reasonable person" would notice, do and observe to the trial court. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). "[I]n the

absence of disputed facts, the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the trial judge." *Moll*, 444 Mich at 26.

ARGUMENT II

THE TRIAL COURT PROPERLY DISREGARDED AS HEARSAY PLAINTIFF'S AFFIDAVIT PURPORTING TO ESTABLISH THAT PLAINTIFF DID NOT DISCOVER HIS MALPRACTICE CLAIM UNTIL SEPTEMBER 2012.

Plaintiff does not offer any response to this argument on application, and therefore no reply is required.

RELIEF REQUESTED

WHEREFORE, Defendants-Appellants respectfully request this Court vacate the Court of Appeals Majority Opinion, adopt the Dissenting Opinion authored by Judge Jansen, or alternatively grant leave to appeal and reinstate summary disposition for Defendants.

Respectfully submitted,

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Dated: January 19, 2017

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_____/

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

MONIQUE VANDERHOFF deposes and says that she is an employee with the firm of PLUNKETT COONEY, and that on January 19, 2017, she caused to be served a copy of the attached Reply Brief in Support of Application for Leave to Appeal and Proof of Service/Statement Regarding E-Service, upon the following:

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